STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
AND THE OAKLAND COUNTY CIRCUIT COURT

STEVEN ILIADES and JANE ILIADES,

Plaintiffs-Appellees, SCt No. 154358

v. COA No. 324726

DIEFFENBACHER NORTH AMERICA, INC. LC No. 12-129407-NP

Defendant-Appellant.

MICHIGAN DEFENSE TRIAL COUNSEL'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is submitted by the Michigan Defense Trial Counsel ("MDTC"). The MDTC is a statewide organization of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, the MDTC accomplishes this by facilitating discourse among, and advancing the knowledge and skill of, defense lawyers to improve the adversary system of justice in Michigan. The MDTC appears before this court as a representative of defense lawyers and their clients throughout Michigan, a significant number of whom are potentially affected by the issues involved in this case.

The opinion of the Court of Appeals in this matter involves an issue of significant importance to *amicus curiae.*

ORDER APPEALED

The MDTC adopts and relies upon the statements contained in the brief on appeal of Defendants-Appellants.

JURISDICTIONAL STATEMENT

MDTC adopts and relies upon the Jurisdictional Statement contained in the brief on appeal of Defendant-Appellant.

STATEMENT OF QUESTION PRESENTED

WHETHER THE COURT OF APPEALS ERRED WHEN IT RULED THAT MISUSE OF A PRODUCT CONTRARY TO SPECIFIC SAFETY INSTRUCTIONS WAS FORESEEABLE SINCE "IT IS COMMON KNOWLEDGE THAT USERS OF ALL KINDS OF PRODUCTS TEND TO DISREGARD SAFETY INSTRUCTIONS".

Plaintiff-Appellee would answer: "NO"

Defendant-Appellant would answer: "YES"

Amicus Curie the Michigan Defense Trial Counsel answers: "YES".

I. STATEMENT OF FACTS

The MDTC adopts and relies upon the Statements of Facts contained in the brief on appeal of Defendant-Appellant Dieffenbacher North America, Inc. ("Dieffenbacher").

II. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's grant or denial of summary disposition in order to determine whether the moving party was entitled to judgment as a matter of law. *Arabo v Michigan Gaming Control Bd*, 310 Mich App 370, 382; 872 NW2d 223 (2015). The Court's goal in interpreting a statute is to give effect to the Legislature's intent as reflected in the statutory language. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 215; 815 NW2d 412 (2012). "While defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme." *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) (footnotes omitted).

III. ARGUMENT

A. Introduction

This case presents issues significant to the jurisprudence of this State, specifically, how a trial court is to apply the statutory mandates of MCL 600.2947 and 600.2945. These statutes require the court to determine whether there has been a product "misuse" and whether the misuse was reasonably "foreseeable." Several Court of Appeals opinions address judicial enforcement of the statutory defense of "unforeseeable misuse," however, all of these cases are unpublished, and do not constitute binding precedent. MCR 7.215(C)(1).

In the instant case, the Court of Appeals' two-member majority held that Dieffenbacher, the manufacturer, should have foreseen that Plaintiff Iliades would intentionally disregard safety training and instructions, and partially climb into an operational press without first manually shutting it down. The majority refused to acknowledge that the product liability statute defines ignoring safety training and warnings as "misuse" of the product. The Court of Appeals held, as a matter of law and public policy, that the refusal of product users to obey safety training, warnings or instructions is foreseeable. This ruling is contrary to the language and intent of the statute and creates uncertainty and inconsistency in the jurisprudence of this State. This Court should grant leave to appeal, reverse the decision of the Court of Appeals and reinstate the order of the circuit court granting summary disposition in favor of defendant.

B. Application of Michigan Product Liability Law

Tort reform legislation enacted in 1995 displaced much of Michigan's prior common law product liability law, replacing it with a detailed statutory scheme. The statutes now define product liability as "an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." MCL 600.2945(h).

Before 1995, the common law generally required that the finder of fact determine whether a product's danger was unreasonable and foreseeable. *Casey v Gifford Wood Co*, 61 Mich App 208, 216; 232 NW2d 360 (1975). Further, pre-1995, in a design defect case, a manufacturer had a duty to design its product so as to eliminate any unreasonable risk of foreseeable injury. *Prentis v Yale Mfg Co*, 421 Mich 670, 688; 365 NW2d 176 (1984). Moreover, a product was "defective" if it was not reasonably safe for its foreseeable uses. *Ghrist v Chrysler Corp*, 451 Mich 242, 249; 547 NW2d 272 (1996).

These provisions were altered by 1995 amendments to the product liability statutes, which were intended to reduce products liability exposure. MCL 600.2945 *et seq*. Specifically, the Act was intended to address the "explosion of product liability litigation, resulting in unfair and excessive judgments against manufacturers and sellers, bankruptcies, reduced capacity of firms to compete internationally, curtailed innovation, reduced funding for research, higher consumer costs, and unaffordable or unavailable casualty insurance." 1995 PA 161, Senate Fiscal Agency Bill Analysis, SB 344, January 11, 1996; See *Cardona v H Schirp GMBH & Co KG*, No. 219651, 2000 WL 33415984, at *3 (Mich App July 28, 2000). (See Exhibit 1). See also Senate Legislative Analysis, SB 344, August 28, 1995; Senate Committee Summary, SB 344, May 9, 1995; Senate Legislative Analysis, SB 344, May 9, 1995.

MCL 600.2947(2) was amended to provide that a manufacturer is not liable for harm caused by misuse of a product unless the misuse was "reasonably foreseeable." MCL 600.2945(e) defines "misuse" as:

> use of a product in a materially different manner than the product's intended use**.** *Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product,* and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

Id. (Emphasis added).

The questions of "misuse" and "foreseeability" are now questions of law for the court. MCL 600.2947(2). That section states:

> A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.

C. The Court of Appeals Failed to Properly Apply Statutory Mandates

The Court of Appeals' opinion makes it clear the panel applied the product liability statute in an extremely restrictive way. The Court of Appeals did not apply the "misuse" definition, commenting, as a starting point for its analysis: "Initially, while we decline to explicitly so decide, we agree with defendant's observation that 'misuse' is defined by statute as, in relevant part, 'uses contrary to a warning or instruction provided….' " *Iliades v Dieffenbacher North America Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2016 (Docket No. 129407), p. 3. However, 600.2945(e) specifically states the quoted language, and thus the Court of Appeals did not need to "explicitly so decide", it simply needed to apply that definition.

The Court of Appeals did acknowledge that "plaintiff's act of partially entering the press in the manner he did appears to have been contrary to instruction provided by his employer." *Id.* This conclusion is sufficient under MCL 600.2945(e) to meet the statutory definition of "misuse", although the Court of Appeals failed to "explicitly… decide" that there was misuse.

The Court of Appeals then turned to the issue of whether Plaintiff's actions were reasonably foreseeable, as a matter of law, as required by the statute. The Court of Appeals used a definition of foreseeability from Blacks' Law Dictionary. *Id.* at 4. However, many Michigan cases over the years have used a different definition. Indeed, the standard definition of "foreseeability" in Michigan has long utilized a "reasonable man" standard. See, e.g., *Samson v Saginaw Profl Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975) ("Foreseeability, therefore, depends upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions.")

Using the Black's definition, the Court of Appeals created a totally new approach to foreseeability, holding:

> [I]n the abstract, it is simply common knowledge that users of all kinds of products tend to disregard safety instructions to a greater or lesser degree. Whether or not they *should* is not the pertinent standard; rather, it is whether the manufacturer should *reasonably expect* it. As a general proposition, manufacturers simply cannot reasonably expect that all instructions will always be followed.

Iliades, unpub op at 4.

Since the determination of foreseeability is now a question for the court, the Court of Appeals should have applied a "reasonable person" standard to determine foreseeability. It did not. Instead, the Court of Appeals held, as a matter of law, that by providing safety instructions *not* to do something, the explicitly prohibited action becomes foreseeable. To put more bluntly, since it is "common knowledge" that safety instructions may be ignored, as a matter of law, misuse based on "uses contrary to . . . training regarding the use or maintenance of the product," per the Court of Appeals' Opinion, would *always* be foreseeable. This tortured logic has previously been rejected in *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743; 593 NW2d 219 (1999). In *Bazinau* the court held:

> A manufacturer's prudent warning to caution against inappropriate use of a vehicle **should not and does not thereby render the inappropriate use foreseeable**. To do so would require manufacturers to design safety devices for every conceivable misuse. This is not the law of Michigan.

Id. at 758–59 (emphasis added). The Court of Appeals' failure to acknowledge this Court's holding in *Bazinau* is a misinterpretation of the statute and creates confusion as to the proper application of foreseeability.

D. No Published Opinions Provide Guidance on the Issue of Foreseeability of Misuse under the Statutes

Very few published Michigan cases have cited any portion of MCL 600.2947 since the statute's enactment, but none of these cases relate to the seminal issue of a court's decision regarding misuse and foreseeability. See *Paige v City of Sterling Hts*, 476 Mich 495, 508; 720 NW2d 219 (2006) (workers' compensation case); *Greene v AP Products, Ltd*, 475 Mich 502; 717 NW2d 855 (2006) (defendants had no duty to warn of the material risk involved with ingesting and inhaling product, because risk was obvious to a reasonably prudent product user); *Robinson v City of Detroit*, 462 Mich 439, 460 n 16, 17; 613 NW2d 307 (2000) (referencing MCL 600.2947(6)(a)'s use of the phrase "proximate cause"); *Curry v Meijer, Inc*, 286 Mich App 586, 599; 780 NW2d 603 (2009) (MCL 600.2947(6)(a) requires a plaintiff to establish that a nonmanufacturing seller failed to exercise reasonable care in addition to establishing proximate cause to prevail on a products liability claim based on breach of implied warranty); *Heaton v Benton Const Co*, 286 Mich App 528; 780 NW2d 618 (2009) (general contractor was not a "sophisticated user" of foundation walls). None of these cases provide any guidance to the court or the bar as to the proper interpretation of MCL 600.2947 in regard to whether the alleged harm was caused by a "reasonably foreseeable" misuse. MCL 600.2947(2).

Several *unpublished* Court of Appeals decisions have examined the issue of whether a misuse of a product was "reasonably foreseeable": *Citizens Ins Co of Am v Prof'l Temperature Heating & Air Conditioning*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2012 (Docket No. 300524) (misuse of a drip pan not reasonably foreseeable) leave to appeal denied. 493 Mich 954 (2013). (See Exhibit 2); *Walton v Miller*, unpublished opinion per curiam of the Court of Appeals, issued October 4, 2011 (Docket No. 293526) (use of cartridge that produced the pressure exhibited in the incident was not reasonably foreseeable) (See Exhibit 3); *Fjolla v Nacco Materials Handling Group*, unpublished opinion per curiam of the Court of

Appeals, issued December 9, 2008 (Docket No. 281493) (not reasonably foreseeable that a user would attempt to use a screwdriver to repair a forklift without disconnecting the battery causing it to unexpectedly travel in reverse) (See Exhibit 4). ; *Davila-Martinez v Brinks Guarding Servs*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2005 (Docket No. 261941) (use of a lock for weight bearing purposes not reasonably foreseeable). (See Exhibit 5). All of the unpublished cases have found that the alleged misuse was not reasonably foreseeable.

E. The Court of Appeals Failed to Follow Established Rules of Statutory Construction

The Court of Appeals' refusal to acknowledge the statutory definition of "misuse" and its assertion that it is "common knowledge" and hence "foreseeable" that a user may violate safety rules and training was an abrogation of the rules of statutory construction. "The rules of statutory interpretation are well-established. The primary goal is to discern the intent of the Legislature." *Simpson v Alex Pickens, Jr, & Assoc, MD, PC*, 311 Mich App 127, 131; 874 NW2d 359 (2015) (citing *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012)). "The best indicator of [Legislative] intent is the language of the statute, and, in determining intent, the words of the statute are given their common and ordinary meaning". *Id.* When interpreting a statute, statutory language must be read and understood in its grammatical context, and effect should be given to every phrase, clause, and word in the statute. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999); *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980) ("No word should be treated as surplusage or rendered nugatory."). By refusing to accept a statutory definition of "misuse" the Court of Appeals failed, in the most extreme way, to interpret the statute.

The Court of Appeals noted, correctly, that the statute does not provide a definition of "foreseeable." Thus, it searched for common law definition of "foreseeable" and relied on a

footnote in a 1977 Court of Appeals case, *Holloway v Martin Oil Service*, 79 Mich App 475, 478 n 3; 262 NW2d 858 (1977), which simply quoted Black's Law Dictionary. *Iliades*, unpub op at 3. The Court of Appeals also cited *Antcliff v State Employees Credit Union*, 95 Mich App 224, 230; 290 NW2d 420 (1982), aff'd, 414 Mich 624; 327 NW2d 814 (1982). Both of these cases pre-date the statute, and neither discusses foreseeability in detail. The Court of Appeals ignored a large collection of more recent binding precedent. In *Glittenberg v Doughboy Recreational Indus*, for example, this Court discussed foreseeability in the context of a duty to warn in a products liability action, noting: "Manufacturers have a duty to warn purchasers or users of dangers associated with the intended use or reasonably foreseeable misuse of their products, but the scope of the duty is not unlimited." 441 Mich 379, 388; 491 NW2d 208 (1992) (footnotes omitted). *Glittenberg* further noted that an expansive interpretation of "foreseeability" (such as what the Court of Appeals adopted below) would make it impossible to market goods: "If there were an obligation to warn against all injuries that conceivably might result from the use or misuse of a product, manufacturers would find it practically impossible to market their goods." *Id.* (quoting Noel, *Products defective because of inadequate directions or warnings*, 23 SWLJ 256, 264 (1969)).

The Court of Appeals failed to acknowledge that uses contrary to a manufacturer's instructions, such as occurred here, are *explicitly included* in the statutory definition of "misuse." MCL 600.2945(e). Furthermore, the statute's recognition of "reasonably foreseeable" misuse necessarily means that some misuse, including "uses contrary to . . . training," is *not reasonably foreseeable*. MCL 300.2947(2) ("A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable"). Accordingly, by holding that all uses of a product contrary to a manufacturer's instructions are

per se foreseeable, the Opinion essentially neuters the text of MCL 600.2945(e), and stands in contradiction with the clear intent of the statute. While Court of Appeals stopped short of holding that *all* violations of a manufacturer's safety instructions are reasonably foreseeable, given the language of the statute, the Court of Appeals could no more argue that all disregard of a warning is per se foreseeable than defendants could argue that every disregard of a warning is per se unforeseeable. Instead, the Court of Appeals held that *ordinary negligence* is reasonably foreseeable while *gross negligence* is not, relying on a criminal case, *People v Feezel*, 486 Mich 184, 195-96; 783 NW2d 67 (2010) ("Ordinary negligence is considered reasonably foreseeable…") However, *Feezel* itself made clear that the issue of "gross" negligence there was whether a victim was so grossly negligent as to absolve the criminal defendant of criminal liability, defining gross negligence as "wantonness and disregard of the consequences which may ensue...." *People v. Barnes*, 182 Mich 179, 198, 148 NW 400 (1914). *Feezel*, 486 Mich at 195.

Gross negligence is not used in a civil context to determine whether a *plaintiff's* actions were foreseeable. Rather, in civil cases (apart from statutory creations such as governmental immunity cases), gross negligence is generally used only to determine whether another cause is a superseding cause that will relieve a *defendant* from liability. This involves an assessment of foreseeability. "[A] defendant will not be liable for an injury caused by an intervening force that was not reasonably foreseeable." *Hickey v. Zezulka*, 439 Mich 408, 437, 487 NW2d 106 (1992), superseded on other grounds *Lamp v Reynolds*, 249 Mich App 591, 604, 645 NW2d 311 (2002).

Further, in a product liability context, the issue of gross negligence is not part of the analysis of foreseeability. Rather, a *prima facie* case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety

device and the severity of injuries sustainable from such an accident. Only then does the analysis turn to the question of whether there is an alternative safety device and whether a device would have been effective as a reasonable means of *minimizing* the foreseeable risk of danger. *Gregory v. Cincinnati Inc.,* 450 Mich 1, 13; 538 NW2d 325 (1995), quoting *Reeves v. Cincinnati, Inc.,* 176 Mich App 181, 187-188; 439 NW2d 326 (1989); *Cacevic v. Simplimatic Eng'g Co.,* 248 Mich App 670, 680; 645 NW2d 287 (2001); *Bazinau v. Mackinac Island Carriage Tours,* 233 Mich App 743, 757-758; 593 NW2d 219 (1999).

It is puzzling why the Court of Appeals did not refer to the product liability statutory definition of "gross negligence" which is: "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." MCL 600.2945(e). The difference between the statutory definition and the criminal definition is striking, since the product statute makes no mention of the criminal "wanton disregard". "Reckless", as provided in the product liability statute is not the same as "wanton." Further, *disregard of the consequences* (per the criminal case) is very different from "substantial lack of concern" as stated in the product statute.

The Court of Appeals, in effect, concludes that the plaintiff's disregard of the safety warnings in this case is ordinary negligence and therefore reasonably foreseeable. The Court of Appeals does not suggest how it would distinguish between ordinary and grossly negligent disregard of a warning. Further, the Court of Appeals cited no civil case for this conclusion. If the legislature had intended to create a statute in which ordinary negligence was always deemed foreseeable, it could have done so. It did not. To read this distinction into the statute, as the Court of Appeals effectively did, is a misapplication of the statute.

IV. THE COURT OF APPEALS RULING IS CONTRARY TO THE LEGISLATIVE INTENT OF PRODUCT LIABILITY TORT REFORM

The biggest practical issue with the Court of Appeals' opinion is that it expands the liability of product manufacturers and sellers. This will, undoubtedly, result in significant increase in suits filed, increase in litigation and a significant increase in cost of goods subject to the increase. This increase in litigation and resultant costs is contrary to the purpose of the product liability tort reform

The product liability statute, 600.2945 *et seq*. (1995 PA 161) was intended to address the "explosion of product liability litigation, resulting in unfair and excessive judgments against manufacturers and sellers, bankruptcies, reduced capacity of firms to compete internationally, curtailed innovation, reduced funding for research, higher consumer costs and unaffordable or unavailable casualty insurance." 1995 PA 161, Senate Fiscal Aging Bill Analysis, SB 344, January 11, 1996. See *Cardona v. H. Schup*, *supra*. (See Exhibit 1). The Court of Appeals' ruling is not consistent with this legislative intent and will lead to a recurrence of the product liability explosion tort reform was designed to correct.

A key element of any product liability action is foreseeability. Pre-1995, the law was that in order to establish foreseeability, a plaintiff needed to show facts establishing that the misuse was foreseeable and the question of foreseeability was one for a jury. See, e.g., *Shipman v. Fontaine Truck Equipment Co*., 184 Mich App 706, 459 NW2d 30 (1990). Under tort reform, the standard was made more rigid, by requiring the court to establish foreseeability as a matter of law. MCL 600.2947(1). Nothing changed the "reasonable man" standard" that had been used for decades. See section C., *supra*.

Under the Court of Appeals opinion, if disregard of warnings is foreseeable, as a matter of law, then manufacturers could be held liable, as a matter of law, for *all* produce misuse of

which it warned. This would be a significant expansion of pre-1995 tort law, and an expansion of the 1995 tort reform statutes. This interpretation of the statute is clearly against the legislative intent of the statute-- which was to reduce costs associated with product liability. As a matter of public policy and proper statutory interpretation, the MDTC urges this Court to grant the Application for Leave to Appeal, so that this Court can rule, consistently with the legislative intent of the statute, to limit the "explosion of product liability", to avoid unfair and excessive judgments, reduce manufacturer bankruptcies and "increase competitiveness". See *Cardona, supra* at 3. (See Exhibit 1); 1995 PA 161, Senate Fiscal Aging Bill Analysis, *supra*.

V. RELIEF REQUESTED

The MDTC request that this Court grant leave to appeal and reverse the decision of the Court of Appeals.

Respectfully submitted,

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